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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-928 — 79-936

BRIDGEPORT HYDRAULIC COMPANY
THE LITCHFIELD WATER COMPANY

v.

THE DIVISION OF PUBLIC UTILITY CONTROL
WITHIN THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF CONNECTICUT, Et Al

THE NEW HAVEN WATER COMPANY
CONNECTICUT AMERICAN WATER COMPANY

v.

THE DIVISION OF PUBLIC UTILITY CONTROL
WITHIN THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF CONNECTICUT, Et Al

ON APPEAL FROM THE SUPERIOR COURT FOR THE JUDICIAL
DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

MOTION TO DISMISS APPELLANTS' JURISDICTIONAL STATEMENTS

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February 12, 1980

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the appellee, Division of Consumer Counsel ("DCC"), moves that the appellant water companies' appeals from the Decision of the Connecticut Superior Court be dismissed. The ground for dismissal is that there is no substantial federal question presented.

OPINION BELOW

The May 12, 1979 opinion and order of the Connecticut Superior Court, Judicial District of Hartford-New Britain, at Hartford, is unreported. This Decision is reprinted and attached to the appellants' jurisdictional statements.

JURISDICTION

The opinion and order of the Connecticut Superior Court involved three consolidated cases which questioned the validity of certain accounting regulations. The consolidated cases include a declaratory judgment action by the Greenwich Water Company and two administrative appeals by the Bridgeport Hydraulic Company and The Litchfield Water Company from rate decisions.

The appellants petitioned the Connecticut Supreme Court for review of the May 12, 1979 opinion and order of the Connecticut Superior Court. The petition for certification was denied on July 24, 1979. The Connecticut Supreme Court subsequently denied a motion for reargument and reconsideration of the petition for certification on September 19, 1979. The Court also dismissed the joint appeals of the appellant companies on October 2, 1979.

The appellants rely on 28 U.S.C. §1257(2) as the basis for this Court's jurisdiction.

QUESTION PRESENTED

Whether amendments to accounting regulations, applicable to the disposition of utility property by water utilities, constitute a taking of property such that this Court is presented with a substantial federal question.

REGULATIONS AND ORDERS

Sections 7, 411.6 and 411.7 of the Connecticut Uniform System of Accounts prescribed for Class A water companies are reprinted in the appellants' jurisdictional statements.

The rate decisions of the Public Utilities Control Authority in Docket No. 760701, Application of the Litchfield Water Company to Increase Its Rates to All Customers, and Docket No. 770301, Application of the Bridgeport Hydraulic Company to Increase Its Rates To All Customers, are reprinted in the jurisdictional statements of the Bridgeport Hydraulic Company and The Litchfield Water Company.

STATEMENT OF THE CASE

The appellee, Division of Consumer Counsel within the Department of Business Regulation of the State of Connecticut[1], is statutorily authorized pursuant to §16-2a of the Connecticut General Statutes, to advocate the interest of Connecticut consumers with respect to investor-owned utilities. The Division of Consumer Counsel, which was served a copy of the appellants' Jurisdictional Statements, is deemed to be an appellee by Rule 10 of the Rules of the Supreme Court of the United States.

The amendments to the Uniform System of Accounts prescribed for Class A water companies[2] were adopted in 1972 by the Connecticut Public Utilities Commission, the predecessor agency of the Public Utilities Control Authority and the present Division of Public Utility Control. These amendments require that gains and losses from the disposition of utility plant and

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[1]Prior to January 1, 1979, the Division of Consumer Counsel was the Office of Consumer Counsel. Public Act 77-614.

[2]Class A water companies have annual operating revenues in excess of $50,000.

property be included in a company's income statement, as opposed to its earned surplus account. More specifically, the amendments treat the gains or losses from the disposition of utility plant and property which was used for providing utility service as utility operating income.[3] Gains or losses from the disposition of utility plant and property which was never "used and useful", however, are treated differently. The amendments provide that the latter gains or losses be accounted for in non-utility related operating income.

After the adoption of the 1972 accounting regulations, the appellants and other Connecticut Class A water companies challenged the constitutionality of these regulations through a declaratory ruling action in Connecticut Court of Common Pleas. *Greenwich Water Co. v. Public Utilities Commission*, Docket No. 108038, Hartford County. While this case was pending, the appellants sought a declaratory judgment and injunctive relief from a three-judge federal court.

In *Bridgeport Hydraulic Company v. Council on Water Company Lands*, 453 F. Supp. 942 (D. Conn. 1977), the three-judge federal court dismissed the companies' claims, including the constitutional challenge. In addition to finding the Johnson Act, 28 U.S.C. §1342, to be a bar to federal intervention in this area, the court reviewed the constitutional claim. The court held that the companies had not proved that the regulations, on their face or as applied, deprived them of any constitutional property right. The Supreme Court summarily affirmed the dismissal without opinion. 439 U.S. 999 (1978).

After the *Bridgeport* dismissal, the pending state court declaratory ruling in *Greenwich Water Co. v. Public Utilities*

[3]Utility plant and property which is used for providing utility service is included in the company's rate base, on which it earns a return. The term "used and useful" denotes utility plant for this purpose, as opposed to plant which is held for future use.

Commission, supra, was revived. This case was consolidated with two appeals from rate decisions by the Public Utilities Control Authority.[4]

In dismissing the consolidated cases, the Connecticut Superior Court upheld the validity of the 1972 accounting amendments. The Court concluded that there was no constitutional violation, based in part on the fact that "there was no showing that the rate of return on investment was inadequate, nor insufficient to attract investors." The Connecticut Superior Court decision is the highest state court decision from which the appellants seek review.

THE JURISDICTIONAL ALLEGATIONS DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The appellants claim that the 1972 amendments to the Connecticut Uniform System of Accounts violate the Fourteenth Amendment to the United States Constitution, which prohibits any state from depriving ". . . any person of . . . property without due process of law." In support of this claim, the appellants contend that the amendments result in the taking of company and shareholder property without due process of law, and without just compensation. Despite this claim, the uncontested facts of this case do not raise a substantial federal question. Since there is no "taking" of company or shareholder property, the question of due process or just compensation does not even arise. The adoption of the 1972 amendments to the Connecticut Uniform System of Accounts is essentially a matter of sound regulatory agency discretion.

[4]*Bridgeport Hydraulic Company v. Public Utilities Control Authority*, Docket No.117874 1, Fairfield County, and *The Litchfield Water Company v. Public Utilities Control Authority*, Docket No. 015775 9, Litchfield County.

I

The 1972 Amendments To The Connecticut Uniform System of Accounts Do Not Result In The "Taking" of Property

In order to reach constitutional proportions, the appellants' challenge to the 1972 Amendments to the Connecticut Uniform System of Accounts must show property deprivation, or a "taking" of property. Unless these amendments result in a "taking" of property, there is no constitutional question regarding due process or just compensation. In attempting to elevate their challenge to a constitutional level, the appellants have glossed over this important threshold issue.

The Fourteenth Amendment to the United States Constitution protects a person against state deprivation of property without due process. This Amendment is not a shield against any government action affecting the use or value of private property. Only extremely onerous government regulation amounts to a taking of property. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The 1972 accounting amendments, on their face and as applied, do not result in such taking.

In order for state regulation to constitute a "taking" of property, there must be ". . . some diminution in the owner's right of use . . ." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). The accounting amendments, which the appellants claim violate the Fourteenth Amendment, have no effect on the use of utility property. These amendments, which require a change in accounting, do not mandate any transfer of rights which are incident to ownership. The accounting amendments do not dictate when a utility should dispose of property, or what the terms of disposition should be. There is no interference with the use of utility property. The effect of the amendments is felt only *after* the disposition of utility property.

Even after the disposition of utility property, the appellants are not deprived of any property right. The proceeds from the disposition of utility property are not wrenched away from utility companies into the hands of ratepayers. The accounting changes merely require that gains or losses from the disposition of property used to provide utility service are reflected in utility operating expenses, which are built into rates. The amendments reflect a change in regulatory policy, which is a matter of agency discretion. The appellants have no property right in any particular method of accounting.

The appellants' attempt to translate pre-1972 accounting methods into a constitutionally protected property right must fail. The Fourteenth Amendment provides no greater protection to the appellants than to any other property owner. The fact that a particular accounting method may produce greater profits for a utility does not create a right to such profits. A utility is not entitled to the most profitable accounting treatment, any more than a landowner is entitled to the most profitable use of his property. The due process and just compensation clauses of the Fourteenth Amendment do not insure the most profitable use of any property. *C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974).

The appellants have no constitutional right to reap windfall profits. They are only entitled to an opportunity to earn just, reasonable and adequate profits on their original investment. See Section IV, *infra*. The 1972 accounting changes do not infringe on the appellants' constitutional right by taking property to which they are entitled.

II

The 1972 Amendments To The Uniform System Of Accounts Do Not Retroactively Deprive The Appellants Of A Property Right

The appellants, New Haven Water Company and Connecticut American Water Company, allege that the 1972 amend-

ments to the Uniform System of Accounts violate the Fourteenth Amendment prohibition against legislation which retroactively divests property rights. Contrary to the appellants' allegation, the 1972 accounting amendments do not deprive them of any property right. Any diminution in the future potential profits available from the disposition of the appellants' property, which results from the 1972 accounting amendments, is not equivalent to the divestiture of property rights. Since the effect of the accounting amendment is prospective, there is no colorable violation of the Fourteenth Amendment.

The appellants have no vested right in a particular method of accounting for the disposition of utility property. They also have no vested right to receive the highest possible profit from the disposition of utility property. The appellants have attempted to convert an expectation in the accounting treatment of utility property disposition into a vested right. This attempt has no constitutional basis. An expectancy of profits based on no changes in regulation is not a protected property interest. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1975).

Flexibility in prescribing proper accounting treatment is especially necessary in utility regulation. Without such flexibility, regulatory changes to protect the paramount public interests would be virtually impossible. In *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84 (1958), the Supreme Court pointed out the distinction between prospective regulation, which may affect prior rights, and retroactive regulation, which violates the Fourteenth Amendment.

> As stated in *Fleming v. Rhodes*, 331 U.S. 100, 107, "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. *So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.* Immunity from federal regulation is not gained through forehanded contracts (emphasis added)."

The appellants have not alleged that there is no authority whatsoever for the adoption of the 1972 amendments. They only challenge the applicability of the amendments to utility land which the companies purchased prior to the amendments. Presumably, the appellants would not challenge the same amendments if they applied only to the disposition of property acquired after the adoption of the amendments. Since there is no question that the Division of Public Utility Control and its predecessor agencies had the authority to adopt regulations requiring specific accounting treatment for the disposition of utility plant, the appellants' challenge to the 1972 amendments is baseless. The fact that the accounting treatment of prospective disposition of utility plant applies to previously purchased property does not invalidate the 1972 amendments. The Supreme Court in *Fleming, supra*, left no doubt over the validity of these challenged amendments.

The appellants' grasping for straws becomes even more apparent by their misplaced reliance on the Contract Clause of the United States Constitution.[3] The appellants claim that the effect of the 1972 amendments is analagous to the issue presented in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). This claim has no foundation. No contractual relationship exists between the appellants and their shareholders regarding the accounting treatment of future utility plant dispositions.

In *Allied Structural Steel, supra*, the Supreme Court invalidated a Minnesota statute which required private employers who voluntarily provided pension plans to pay a

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[3]The Contract Clause, which is contained in Art. I, §10 of the U.S. Constitution provides:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

substantial fee if they terminated existing plans or closed an office located in Minnesota. The Court held that the statute violated the Contract Clause of the Constitution by drastically altering the contractual relationship between employers and employees. In effect, ". . . the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liablity in potentially disabling amounts." 438 U.S., at 247. The Court in *Allied Structural Steel* never extended the Contract Clause by analogy to non-contractual relationships.

In delineating the scope of the Contract Clause, the Court in *Allied Structural Steel* pointed out that the police power of the States is not obliterated by the Contract Clause. The police power is so extensive that minimal alterations of contractual obligations are tolerable. 438 U.S., at 245. Moreover, the Court noted that:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as *the police power, is an exercise of the sovereign right of the Government* to protect the lives, health, morals, comfort and general welfare of the people, *and is paramount to any rights under the contracts between individuals.*" *Mannigault v. Springs*, 199 U.S. 473, 480.

438 U.S., at 241 (emphasis added). Even if the appellants had some contractual right to a particular accounting treatment, the police power inherent in the Division of Public Utility Control and its predecessor agencies must prevail. This overriding

power prompted the Court to note one commentator's view, that:

> "the results might be the same if the contract clause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property."[6]

438 U.S., at 241, n.12. In light of the appellants' lack of a contractual or property right in particular accounting treatment, no question regarding the Contract Clause or the Fourteenth Amendment is legitimately raised.

III

There Is No Constitutional Question Regarding the Accounting Treatment Of Utility Plant Disposition

The appellants' attempt to build a substantial federal question out of a strictly state regulatory matter, is contrived. The accounting treatment mandated by the 1972 Amendments to the Uniform System of Accounts is a proper exercise of regulatory authority, which does not raise constitutional issues. The decisions from other jurisdictions regarding the legality of various accounting methods for the gains and losses on the disposition of utility plant reinforce the local nature of accounting procedures.

The appellants correctly state that four courts have held that in particular instances the profit from the sale of a non-depreciable asset that is no longer in service may not be used to reduce rates. *City of Lexington v. Lexington Water Co.*, 458 S.W.2d 778 (Ky. Ct. App. 1970); *Keystone Water Co. v.*

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[6]The appellants misinterpret the commentator to mean "that the Due Process Clause of the Fourteenth Amendment occupies the same Constitutional ground as the Contract Clause."

Pennsylvania Public Utility Commission, 19 Pa. Commw. Ct. 292, 339 A.2d 873 (1975), *aff'd by an equally divided court per curium*, 477 Pa. 594, 385 A.2d 946 (1978); *Boise Water Corp. v. Idaho Public Utilities Commission*, 99 Idaho 158, 578 P.2d 1089 (1978); *Pennichuck Water Works v. New Hampshire*, 103 N.H. 49, 164 A.2d 669(1960). The appellants, however, mistakenly attribute the rationale in *Lexington, supra*, to constitutional considerations. In affirming a trial court decision which reversed a public service commission order, the *Lexington* court relied solely on the commission's uniform system of accounts. Accordingly, the Kentucky accounting system

> provided that a loss upon the sale of land is charged directly to the surplus account — to the shareholders. A profit is credited in the same manner.

458 S.W.2d at 779. The accounting treatment, not constitutional law, was controlling in *Lexington*.

Although constitutional issues were raised in *Keystone, supra*, the case focused on the exclusion of $1.3 million which represented the company's investment in a filtration plant, from the company's rate base for ratemaking purposes. In holding that this investment should have been included in the company's rate base, the court relied on the following principle:

> . . . the rates set by the Commission must not be confiscatory. It has been held that *confiscation results when the order of the Commission refuses the utility company an opportunity to earn a fair return upon the fair value of its property devoted to public service.*

339 A.2d, at 877 (emphasis added). The constitutional issue in *Keystone, supra*, has nothing to do with the accounting treatment of gains or losses resulting from the disposition of utility plant.

The appellants in the instant case have not been deprived of an opportunity to earn a return on property used to provide utility service. Connecticut ratepayers have provided an

adequate return on utility plant formerly included in rate base. The 1972 accounting amendments merely provide that gains or losses on the disposition of utility property be employed in utility operations.

The fact that none of the decisions cited by the appellants raise constitutional issues regarding the accounting treatment of the disposition of utility plant, should dispel any doubt that no substantial federal question is involved. One decision is particularly dispositive on this point. In *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), the Court of Appeals found no constitutional restrictions in the adoption of regulations dealing with the allocation of land sale gains.

> *We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service.* We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested have lost all present-day vitality.

485 F.2d, at 800 (emphasis added). The court's explicit rejection of constitutional parameters supports the dismissal of the instant appeal for lack of a substantial federal question. The 1972 accounting regulations are not subject to constitutional attack.

IV

The Appellants' Constitutional Rights Are Not Impaired By The 1972 Amendments To The Uniform System of Accounts

The constitutional protections to which the appellants are entitled are of a general nature. The state regulatory process

must protect the original amount of invested capital, and provide a reasonable level of revenues, which enables a utility to pay for operating expenses and earn a fair return on the original value of service related property. *Bluefield Waterworks & Improvements Co. v. Public Service Commission*, 262 U.S. 679, 692-93; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591. As long as these protections are afforded, the regulatory agency has broad discretion in carrying out its responsibilities. The 1972 amendments do not encroach upon these constitutional protections.

The appellants' original investment in utility property is not impaired by the 1972 amendments. The accounting of gains or losses from the disposition of utility property does not interfere with setting rates which are "just, reasonable and adequate."[7] The fact that a particular accounting regulation incidentally may benefit ratepayers or shareholders is not constitutionally relevant. As long as the end result of the regulatory process provides a fair balance between shareholder and consumer interests, an accounting regulation is lawful. The appellants are constitutionally entitled to nothing more than a reasonable opportunity to earn the allowed rate of return. *Connecticut Light and Power Co. v. Public Utilities Control Authority*, 40 Conn. L.J. No. 14 at 7. (Supreme Ct. Oct. 3, 1978). The 1972 amendments do not infringe on the regulatory agency's responsibility to set rates which are not confiscatory.

If the appellants' rates do not provide sufficient revenues to produce lawful earnings, they may seek rate relief. Moreover, the appellants may appeal from any decision of the Division of Public Utility Control which does not provide adequate revenues. The appellants' contrived constitutional claim is in effect, a challenge to the sufficiency of all prior rate

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[7]Section 16-19 of the Connecticut General Statutes mandates that rates be just, reasonable and adequate. This is the responsibility of the Division of Public Utility Control, as well as its predecessor agencies, which supercedes all accounting regulations.

decisions. The speciousness of this claim is apparent by the fact that no utility company is challenging the constitutionality of the 1972 accounting treatment for gains on the sale of utility plant, other than land.

Since the appellants exist for the purpose of providing water service to the public, their investment in land was for the same purpose, and not for profit and speculation. The appellants already have been adequately reimbursed for costs incurred in acquiring and holding land. Accordingly, all of their constitutional rights have been protected and guaranteed.

CONCLUSION

For all of the above reasons, the appellants' jurisdictional statements do not present a substantial federal question, and therefore, should be dismissed.

Respectfully submitted,

DIVISION OF CONSUMER COUNSEL

By: BARRY S. ZITSER
Consumer Counsel

with whom on the brief was

VALERIE J. BRYAN
Staff Attorney

Certificate of Compliance with Rule 33

This is to certify that a copy of the foregoing was served on the following, being all counsel of record, by depositing the same in a United States mailbox, first class postage prepaid, to Carl Burns, Esquire, P. O. Box 191, 143 Rowayton Avenue, Rowayton, Connecticut 06853; Harold E. Drew, Esquire, P. O. Box 470, Derby Connecticut 06418; Thomas E. DuPont, Esquire, 23 Academy Street, P. O. Box 267, Danielson, Connecticut 06239; Richard P. Gilardi, Esquire, 855 Main Street, Bridgeport, Connecticut 06604; Robert S. Golden, Jr., Esquire, and William B. Gundling, Esquire, Division of Public Utilities Control, State Office Building, Hartford, Connecticut 06101; Joseloff, August & Sudarsky, 80 State Street, Hartford, Connecticut 06103; Joseloff, August & Sudarsky, 945 Hopmeadow Street, Simsbury, Connecticut 06070; Koskoff & McMahon, 144 West Main Street, Plainville, Connecticut 06062; Maurice Maline, Esquire, 65 Oak View Circle, Bridgeport, Connecticut; Douglas McCallum, Esquire, P. O. Box 176, Unionville, Connecticut 06085; Pinney, Payne, VanLenten & Burrell, 26 West Street, Danbury, Connecticut 06810; Peter A. Treffers, Esquire, P. O. Box 617, New Haven, Connecticut 06509; Rural Water Company, Incorporated, West Redding, Connecticut 06896; Donald F. Keefe, 205 Church Street, New Haven, Connecticut 06114; and to Palmer S. McGee, Jr., Esquire and Allan B. Taylor, Esquire, Day, Berry & Howard, One Constitution Plaza, Hartford, Connecticut 06103 on this 12th day of February, 1980.

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